

WORKING GROUP 1

SUBGROUP 1

INTERNAL SUBMISSIONS

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**DRAFT MOTION TABLED BY THE DEMOCRATIC PARTY AT CODESA,
WORKING GROUP 1, SUB-COMMITTEE 1**

**RE : REMAINING LEGISLATIVE MEASURES MILITATING AGAINST FREE
POLITICAL ACTIVITY**

We, the duly authorised representatives of political parties, political organisations, administrations and the South African Government ,

RECOGNISING that a multi-party democracy and the process of negotiations leading thereto presuppose the right of political parties and organisations to organise freely without interference or harassment from the state, administrations or other political organisations ;

FURTHER RECOGNISING that certain existing legislative measures militate against such free political activity ;

ACKNOWLEDGING the need for statutory measures, formulated in accordance with internationally acceptable norms, conferring extraordinary powers on the government during times of national emergency ;

FURTHER ACKNOWLEDGING the need to formulate certain principles which we consider fundamental to free political activity and which can be used as guidelines in the evaluation of existing legislative measures militating against free political activity;

HEREBY AGREE that every political party or organisation and its members must enjoy :

1. Freedom of expression and assembly ;
2. The freedom to join, organise and be represented by political parties and organisations of one's choice ;
3. Equitable access to State-controlled/statutorily instituted media and must have access to information generated and controlled by the state, other than information internationally accepted to be of secret nature ;
4. Freedom from harassment and intimidation by the state or their organs, administrations, other political organisations or their members ;

AND ALSO AGREE THAT :

Consequential repeals or amendments to existing legislation should be effected.

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STATEMENT OF WORKING GROUP1, SUBGROUP1

1. This Subgroup 1 of Working Group 1 recognises that a climate for free political participation is an essential element of the transitional phase towards and in a democratic South Africa and
2. The process of democracy requires that all the participants in the political process should be free to participate in that process without fear and on an equal footing and on the basis of equality with other participants.

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PROPOSALS BY SA GOVERNMENT ON ESTABLISHING GENERAL PRINCIPLES WHICH WOULD SERVE AS GUIDE-LINES FOR DECIDING WHETHER SPECIFIC LAWS SHOULD BE REPEALED, AMENDED OR LEFT UNALTERED IN ORDER TO CREATE A CLIMATE FOR FREE POLITICAL PARTICIPATION

1. In order to approach the task it is necessary to define the expression "free political activity". It is considered that free political activities entail:

- (a) To form and to be a member of a political party (for this purpose it is imperative that a satisfactory definition of what constitutes a political party should be formulated).
- (b) To give expression of political convictions in a peaceful manner.
- (c) To be appointed and elected to legislative, executive and administrative offices.
- (d) To assemble and demonstrate peacefully and within the relevant laws and to canvass for and present petitions.
- (e) Freedom of speech and association.
- (f) No compulsion on individuals or groups to associate with other individuals or groups.

2. If is a fundamental principle that individual rights may not encroach on the fundamental rights of others. Likewise political activities or political rights like any other right, are not totally unlimited. The following quotation in this regard is relevant:

"Free speech, raised in protest, is the life blood of democracy, yet the freer the speech the more likely it is to inflame its audience to violence. But violence can kill democracy, for given rein it will destroy the democracy that licensed it; while to curb it freedom itself may have to be restricted and democracy thus impaled on the other horn of the dilemma. Any nation which so orders its affairs as to achieve a maximum of freedom of speech with a maximum of freedom from public disorder may fairly claim a prize among the highest achievements of the human race". (TA Critchley, The Conquest of Violence).

3. Political objectives can also be strived for by means of strike action, go-slow, work by the rule, and civil disobedience. Civil disobedience can be categorized into persuasive and coercive civil disobedience. There are those who are of the opinion that persuasive civil disobedience is a legitimate and tolerable expression of extreme dissent in a free society, whilst coercive civil disobedience threatens to subvert the authority of the government. The fact is that civil disobedience as a method of protest is a risk and unacceptable when the lawbreaking involves violence which threatens or injures the rights or property of other citizens. The present volatile situation in South Africa makes civil disobedience an unacceptable political instrument. Hence the

provisions in this regard in the Internal Security Act, 1982, should be retained.

4. It seems to be much easier to say what free political activity should not be:

(a) It should not be any violent coercion such as terrorism, intimidation or threats to that effect.

(b) It should not be the trampling of the rights of others and a disruption of society. It is also stressed in the National Peace Accord that everybody has the right to participate freely in "peaceful political activity".

5. It is acknowledged, also by the ANC, that even a future government will need "some form or the other of security legislation based on universally accepted norms and principles". The ANC does however not give any indication of its alternate proposals for consideration by the Working Group. It should be the ultimate goal that emergency laws as well as other forms of security legislation conform to international standards which are presently being developed.

6. The present process of negotiations with the aim to achieve constitutional, economic and social transformation in a peaceful manner, would have been much easier if all parties and organizations in the country were partaking and resort to peaceful political activity in order to attain their political

objectives. This however is not the case. The vantage point of the Democratic Party in this regard states an ideal rather than reality:

"The current negotiation process aimed at creating a non-racial democratic South Africa, presupposes the transformation of armed resistance against the apartheid state into peaceful political activity aimed at the successful conclusion of the negotiation process and the creation of a non-racial government."

The process of transformation is complicated by parties, organizations and individuals who stand outside this process and whose desire it is to wreck this process with all means at its disposal, including naked terrorism, threats of violence, the use of actual violence and intimidation and mass action which often has the potential to result in violence. There is no doubt that these actions endanger the peaceful process which is presently taking its course. Whilst it is conceded that some of the laws in the statute book may inhibit free political activity, if misused, it is just as easy to understand that violence, intimidation and terrorism not only may, but in fact do inhibit free political activity and democracy. To simply repeal legislation which does have a role in curbing violence, terrorism and intimidation, without filling the vacuum, would leave those people who wish to partake in peaceful political activity in the position where they are at the moment, whilst those people who wish to use violence in attaining their political goals are given an absolute free hand. It should

be acknowledged that some security measures should be retained also during this period of transformation.

Anthony Mathews stated:

"It is a safe but regrettable assumption that in any transitional period towards a new political and social dispensation, presided over by whatever ruling party, the institutions of detention and banning will be retained as necessary instruments of control".

7. In the establishing of principles on guide-lines to decide which laws should be repealed, amended or left unaltered, the following aspects should be borne in mind:

- (a) No vacuums should be created which could be exploited in order to deteriorate the present volatile situation.
- (b) A consultation procedure such as for the exercising of powers for the declaration of a state of emergency will have to be developed in tandem with constitutional arrangements whether in the interm or final phase.
- (c) Apart from aspects such as law and order, some of the measures in question have a regulatory effect ensuring a balancing of conflicting rights and leaving a vacuum would automatically cause a trampling of some people's rights. A good example are the measures pertaining to gatherings

and processions. It serves no good purpose to allow absolutely free protest meetings or processions without taking cognizance of the rights of other people. The present measures, with its shortcomings do regulate the balancing of conflicting rights.

- (d) Parties to CODESA who are represented in Sub-Work Group 1 should propose interim measures which could effectively be applied to curb the present violence.

8. The following principles can be proposed:

- (a) Measures which could be repealed without adversely affecting the security situation and which do not have an important regulatory effect should be repealed viz the Affected Organizations Act, 1974.
- (b) An enactment dealing with funding of political parties could comprehensively be dealt with under the heading "the funding of political parties" which is being addressed by sub-working group 3. The Government will in that context deal with proposals in this regard.
- (c) The principles contained in the Public Safety Act, 1953, should be considered in tandem with constitutional arrangements, whether in the interim or final phase. In this regard cognizance must also be taken of the review of international norms pertaining to emergency powers

presently being undertaken by a committee of the U N .
(See Annexure A)

- (d) Section 4 of the Internal Security Act, 1982, should remain in place as long as there are organizations which retain violence as an option to achieve political aims. There is a difference in interpretation regarding the ambit of section 4(1). The fact is that section 4(1) is now objectively justiciable and its ambit is limited to organizations which uses violence to achieve political aims.
- (e) Regarding protest actions such as gatherings and processions, the position was clearly stated by the State President on 12 September 1989 when he stated that peaceful protest is permissible as long as it takes place according to the law. In the National Peace Accord all political parties who signed the Accord undertook to -

"ensure that the appropriate authorities are properly informed of the date, place, duration and, where applicable, routing of each public meeting, rally, march or other event organised by the party or organisation, take into account local sentiment and foreseeable consequences, as well as any other meetings already arranged on the same date in close proximity to the planned event, provided that this shall not detract from the right of any political

party or organization freely to propagate its political views".

The signatories to it, acknowledged in the National Peace Accord that the provisions of the Peace Accord are subject to existing laws, rules and procedures and budgetary constraints. Protest action should, therefore, still be conducted within the limits of existing laws.

The Goldstone Commission is presently investigating the existing measures regarding gatherings and processions. Any suggestions regarding the reform or improvement of these measures can be made to the Secretariat, if anyone is of the opinion that present legislation regarding gatherings and processions are inadequate or inappropriate.

Sections 46 and 53 could be amended, but the following principles should be reflected in amending legislation:

- (i) A duty upon the organizers to give advance notice of protest actions and to ensure that from their side everything possible is done to control the protesters.
- (ii) Liaison between the different authorities and organizers to ensure adequate measures-
 - (aa) to control the protesters;

- (bb) to protect property and lives;
 - (cc) to ensure that the rights of others such as the free flow of traffic, business, etc are not ~~unnecessarily~~ ^{improperly} interfered with.
- (iii) The power to stipulate, where the necessary results cannot be obtained by liaison -
- (aa) the maximum number of participants in protest action;
 - (bb) the place or route of a protest procession or gathering;
 - (cc) the time it may be held.
- (iv) As a last resort, the power to prohibit an open air gathering or procession where serious disruption of the public order is imminent, should be retained.
- (f) Regarding the offences such as terrorism and sabotage, the opinion is held that these offences do not inhibit peaceful political activities, and should be retained for the time being. The repeal of the said measures may be seen by militants as a signal that terrorism, etc is not seen in the same light as previously and that the consequences of practising terrorism or sabotage would

be criminally treated less harshly. Terrorism may thus be encouraged.

- (g) Also in respect of the statutes relating to the media and which could inhibit free political activity eg. the Publications Act, 1974, the objections are more academic than real. A future or interim bill of rights must be the yard-stick for measuring existing legislation, in order to ensure that these measures will in a future dispensation be in accordance with accepted norms.

INTERNATIONAL CRITERIA FOR EMERGENCIES

1. The Special Rapporteur of the United Nation's Sub-Commission on Prevention of Discrimination and Protection of Minorities annually presents reports to the said Commission on the question of human rights and states of emergency. The latest available report has been obtained. At the time of the presentation of the report (24 June 1990) emergencies existed in the following countries:

Algeria	Cameroon
Colombia	Israel
Jordan	Lesotho
Malaysia	Mali
Myanmar	Peru
Philippines	Rwanda
Sierra Leone	Sudan
Siryan Arabian Republic	Thailand
Turkey	USSR
Northern Ireland	

Since 1985 a state of emergency has been declared in more than 30 countries world-wide. It is a generally accepted principal that every country should provide for circumstances such as external threat of invasion or a natural catastrophe or internal dissension. It has once been stated by an author on constitutional law that:

"Totalitarian states do not need exceptional powers in times of crisis - their normal powers suffice for any situation, but free societies do need to give their governments wide powers with which to meet dangerous circumstances"

Another author on emergency law remarked:

"It is probably no exaggeration to say that at any given time in recent history a considerable part of humanity has been living under a state of emergency. It is a phenomenon which reaches into every region of the globe" (Bonner: Emergency Powers in Peace-time (1984) 13).

3. What is important is that if in situations of war, armed conflict or internal unrest emergency measures are taken without a state of emergency being officially proclaimed, such measures may have a far more negative impact on human rights than in a proclaimed, controlled emergency. The abovementioned Sub-Committee of the United Nations has recognized the fundamental importance of the existence, in each country, of specific and effective national legislation enabling such situations to be dealt with and has invited Governments which have not yet done so to consider the adoption of internal legislation consistent with the requirements of international instruments concerning states of emergency.

4. The international instruments referred to above provide only broad guide-lines in respect of the content of emergency legislation. There has been various attempts to formulate criteria

for emergency legislation:

- (a) The Siragusa Principles- drafted by 31 international law experts from all over the world. (1984)
- (b) The Paris Minimum Standards Human Rights Norms in a state of state of emergency drafted by the International Law Association after years of research (1984).

Both these documents do not enjoy a specific status in International Law.

5. Also in the abovementioned Sub-Committee of the United Nations a comprehensive study was presented regarding such norms and the most detailed guide-lines up to date regarding emergency legislation was presented in the report under the title "Guidelines for the Development of Legislation on States of Emergency".

6. The last-mentioned guide-lines are still only initial draft guide-lines presented solely for the information of the Sub-Commission and the Commission on Human Rights.

7. It can be accepted that, whilst it took years for the UN to develop some draft guide-lines for emergency legislation, there would be a very few countries where emergency legislation should comply in all respects to those guide-lines. The proposed guide-lines would, as a result of different legal and constitutional systems, have to be moulded to suit any specific legal system. It

can, in the circumstances not be expected that the legislation of every country or any country for that matter, immediately comply to what is at this stage only draft guide-lines.

8. In respect of requests for the repeal of the Public Safety Act, 1953, the ideal is that for South Africa, in order to comply with international standards, rather than only local demands, the proposed guide-lines must be studied in an endeavour to comply with those standards. To achieve this there is no sense in now making any over-hasty amendments to emergency legislation. The UN Sub-Commission in question will proceed with its task during August 1992.

